

**United States Department of Labor
Employees' Compensation Appeals Board**

D.P., Appellant

and

**DEPARTMENT OF JUSTICE, U.S.
MARSHALLS SERVICE, Omaha, NE, Employer**

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**Docket No. 15-1331
Issued: March 18, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 27, 2015 appellant filed a timely appeal from an April 30, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated August 2, 2013 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant argues that his lumbar problems relate to an accepted October 4, 2004 employment injury. He contends that the medical evidence submitted establishes his claims and medical expenses incurred should be paid by OWCP.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 19, 2013 appellant, then a 38-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on June 18, 2013 he sustained severe lower back pain as the result of bending/twisting reaching for his tactical vest.²

In a July 3, 2013 letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him as to the medical and factual evidence required to establish his claim and afforded him 30 days to provide the requested information.

In response to OWCP's request appellant submitted hospital and medical reports.

In a June 20, 2013 emergency room report, Dr. Jeffrey S. Cooper, an examining Board-certified emergency room physician, noted that appellant was seen for back pain which had begun two days prior and that, according to appellant, it was a recurrent problem. Appellant related that he first sustained a back injury in 2004, which had previously worsened. A physical examination revealed lumbar back tenderness, decreased range of motion, and spasm.

A June 26, 2013 x-ray interpretation showed early lumbar spondylosis and degenerative disc disease with no evidence of instability.

In a June 26, 2013 report signed by Dr. Chris A. Cornett, an examining Board-certified orthopedic surgeon, and Dr. Brent R. Hood, an examining osteopath, appellant was diagnosed with a herniated disc and lumbar degenerative disc disease. The doctors noted that appellant sustained a back injury in 2004. A magnetic resonance imaging (MRI) scan taken at the time showed L4-5, L5-S1 bulging discs. Appellant claimed to be incapacitated by back pain several times a year and that he recently was seen in the emergency room. Drs. Cornett and Hood reported that appellant had a recent episode of low back pain due to twisting and reaching for his tactical vest while at work.

By decision dated August 2, 2013, OWCP denied the claim as the medical evidence of record failed to establish a causal relationship between the diagnosed conditions and the accepted June 18, 2013 incident.

Appellant was seen on May 7, 2014 by Dr. Cornett for a follow-up from his 2004 back injury. He diagnosed an exacerbation of his preexisting back condition.

On June 9, 2014 OWCP received June 23, 2013 discharge instructions from Dr. Cooper, a June 23, 2013 Nebraska Medical Center report by Dr. Aaron N. Barksdale, an examining Board-certified emergency room physician, and appellant's statement.

In the June 23, 2014 report, Dr. Barksdale provided physical examination findings and diagnosed a likely right side lumbar muscle strain. Under history of injury, he noted that

² A June 21, 2013 memorandum to file shows that appellant has prior claims under OWCP File Nos. xxxxxx337, xxxxxx292, xxxxxx893, xxxxxx807, and xxxxxx153. No injury dates were associated with the claim numbers.

appellant had a history of recurrent back pain which had been aggravated when he reached into his back seat a few days prior.

OWCP also received chiropractor reports from Mouw Family Chiropractic for the period April 4 to July 22, 2014 which reflected a diagnosis of subluxation and provided details of the treatment provided.

In a November 24, 2014 e-mail appellant requested help from the employing establishment in getting his June 20, 2013 hospital bill paid. He stated that his emergency room visits on June 20 and 23, 2013 were due to his accepted October 4, 2004 injury. While OWCP paid the June 20, 2013 emergency room bill, it denied the June 23, 2013 emergency room bill.³

On December 1, 2014 OWCP received appellant's July 11, 2014 reconsideration request of the August 2, 2013 decision.

Subsequent to his request for reconsideration appellant submitted evidence regarding bills and payment materials for the June 23, 2013 Nebraska Medicine emergency room visit, his statement regarding unpaid bills for his accepted lumbar condition, and claims filed with OWCP for this condition.

On February 27, 2015 OWCP accepted the condition of L4 and L5 lumbar subluxation due to an April 4, 2014 employment injury.

By decision dated April 30, 2015, OWCP denied appellant's July 11, 2014 reconsideration request because his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁴ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵

OWCP, however, may not deny an application for review solely as the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁶ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit

³ Appellant also submitted evidence detailing his prior OWCP claims including, OWCP File Nos. xxxxxx337 (an October 4, 2004 injury date), xxxxxx929 (a May 1, 2006 injury date), xxxxxx893 (an October 7, 2008 injury date), xxxxxx807 (a February 10, 2009 injury date), xxxxxx153 (an October 23, 2012 injury date), xxxxxx436 (a June 18, 2013 injury date), and xxxxxx128 (an April 4, 2014 injury date).

⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.⁷

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹² To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹³

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on August 2, 2013. OWCP received appellant's July 11, 2014 request for reconsideration on December 1, 2014; thus, the request was outside the one-year time limit.¹⁴ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his traumatic injury claim.¹⁵

⁷ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(e) (December 2011). OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *See supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁴ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(e)(6) (August 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision and the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.

¹⁵ 20 C.F.R. § 10.607(a); *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

The Board finds that the evidence submitted by appellant in support of his request for reconsideration does not raise a substantial question as to the correctness of OWCP's August 2, 2013 decision or shift the weight of the evidence of record in his favor. In the last merit decision, OWCP found the medical evidence of record insufficient to establish a causal relationship between appellant's diagnosed medical conditions and the accepted June 18, 2013 incident.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁶ Appellant has not submitted rationalized medical evidence addressing how the June 18, 2013 incident caused or aggravated a lumbar condition. He resubmitted a June 23, 2014 report by Dr. Barksdale which had been considered by OWCP in its August 2, 2013 decision. Appellant also submitted a June 20, 2013 hospital bill and treatment reports for the period April 4 to July 22, 2014 from his chiropractor. These reports postdate and do not discuss the June 18, 2013 incident. Appellant has not provided any well-rationalized medical opinion establishing error in the denial of his traumatic injury claim. The evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of the last merit decision. He has not demonstrated clear evidence of error.

On appeal appellant's argument concerns the failure of OWCP to pay medical bills which he argues are clearly related to his accepted October 4, 2004 employment injury. He states that he had a healthy back prior to working for the employing establishment and sustained an accepted work injury on October 4, 2004. Since the October 4, 2004 injury appellant has had pain and continuing back problems. He noted that he had also filed a traumatic injury claim for an incident which occurred on April 4, 2014, which OWCP accepted and was as accurate as the June 18, 2013 claim. Appellant contended that both the June 18, 2013 and April 4, 2014 incidents were an aggravation of his preexisting condition. In conclusion, he requested that OWCP pay his medical bills for the June 23, 2013 emergency room visit, the unpaid chiropractic treatment due to the April 4, 2014 injury, and that he be granted approval for 48 chiropractic visits per year. As discussed above, the Board does not have jurisdiction over the merits of the underlying issue of OWCP's denial of his June 18, 2013 traumatic injury claim. Moreover, appellant's arguments pertain to the failure of OWCP to approve medical expenses related to either the October 4, 2004 injury or aggravations of this condition.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits as his request was untimely filed and failed to demonstrate clear evidence of error.

¹⁶ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 30, 2015 is affirmed.

Issued: March 18, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board